



WISCONSIN LEGISLATIVE COUNCIL AMENDMENT MEMO

2003 Assembly Bill 861	Assembly Substitute Amendment 2
<i>Memo published: March 11, 2004</i> <i>Contact: Anne Sappenfield, Senior Staff Attorney (267-9485)</i>	

Assembly Bill 861 makes several changes to current law relating to sexually violent persons [ch. 980, Stats.]. The bill modifies the definition of “sexually violent person,” modifies the proceedings and criteria for granting supervised release of a person who has been committed as a sexually violent person, and creates a committee to recommend locations for a transitional facility for such persons in Milwaukee County. The substitute amendment also makes such modifications and modifies other provisions of the sexually violent persons law and law relating to that law.

THE SUBSTITUTE AMENDMENT

Definition of “Sexually Violent Person”

Under *current law*, “sexually violent person” is defined as a person: (1) who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of or not responsible for a sexually violent offense by reason of insanity or mental disease, defect, or illness; and (2) who is dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence. “Substantially probable” has been interpreted to mean much more likely than not. [*State v. Curiel*, 227 Wis. 2d 389, 597 N.W.2d 697 (1999).]

Under current law, “sexually violent offense” means first- or second-degree sexual assault, first- or second-degree sexual assault of a child, incest with a child, or child enticement. In addition, “sexually violent offense” includes first- or second-degree intentional homicide, first- or second-degree reckless homicide, aggravated battery, aggravated battery to an unborn child, false imprisonment, taking hostages, kidnapping, or burglary if determined to be sexually motivated. “Sexually motivated” means that one of the purposes for an act is for the actor’s sexual arousal or gratification.

The *substitute amendment* modifies the definition of “sexually violent person” and requires that the person is dangerous because he or she suffers from a mental disorder that makes it likely that the

person will engage in one or more acts of sexual violence. “Likely” is defined as more likely than not. The substitute amendment also defines “act of sexual violence” to mean conduct that constitutes the commission of a sexually violent offense.

The *substitute amendment* adds third-degree sexual assault to the list of sexually violent offenses. In addition, it adds felony murder, administering a dangerous or stupefying drug, robbery, and physical abuse of a child to the list of sexually violent offenses if such an offense is determined to be sexually motivated. Under the substitute amendment, “sexually motivated” means that one of the purposes for an act is for the actor’s sexual arousal or gratification *or* for the sexual humiliation or degradation of the victim.

Periodic Reexamination

Under *current law*, the Department of Health and Family Services (DHFS) must conduct an examination of the mental condition of each person who has been committed as a sexually violent person within six months of the initial commitment and every 12 months thereafter to determine whether the person has made sufficient progress for the court to consider whether the person should be placed on supervised release or discharged.

Under the *substitute amendment*, DHFS must conduct the examination within 12 months after the date of the initial commitment order and every 12 months thereafter. At the time of the examination, DHFS must prepare a treatment report based on its treating professionals’ evaluation of the person’s progress in treatment and of whether that progress has been sufficient and their description of the type of treatment that the person would need in the community if supervised release were ordered.

The examiner’s report, as required under current law, must include an assessment of the risk that the person will re-offend, whether the risk can be safely managed in the community if reasonable conditions of supervision and security are imposed, and whether the treatment that the person needs is available in the community.

Finally, at the time of the examination, DHFS must recommend to continue the person in institutional care, release the person under supervised release, or discharge the person from the commitment.

Supervised Release

Under *current law*, a person who is committed as a sexually violent person may petition the committing court to authorize supervised release if at least 18 months have elapsed since the initial commitment order was entered or at least six months have elapsed since the most recent release petition was denied or the most recent order for supervised release was revoked. The director of the facility at which the person is placed may petition on the person’s behalf at any time.

The court must grant the petition unless the state proves by clear and convincing evidence that the person is still a sexually violent person and that it is still substantially probable that the person will engage in acts of sexual violence if the person is not continued in institutional care.

Under the *substitute amendment*, within 30 days after the filing of the reexamination report, treatment report, and DHFS recommendation, the person subject to the commitment, the district attorney (DA), or the Department of Justice (DOJ), may object to the recommendation by filing a written objection with the court.

If DHFS's recommendation is continued institutional care, and there is no objection, the recommendation is implemented without a hearing. If DHFS recommends discharge or the person files an objection requesting discharge, the court shall proceed with determining whether discharge is appropriate. Otherwise the court, without a jury, must hold a hearing to determine whether to authorize supervised release.

The court may order that a person be placed on supervised release if it finds that all of the following apply:

- The person has made sufficient progress in treatment such that the risk that the person will re-offend can be safely managed in the community.
- That there is treatment reasonably available in the community and the person will be treated by a provider who is qualified to provide the necessary treatment in this state.
- The provider presents a specific course of treatment, agrees to assume responsibility for the treatment, agrees to comply with the rules and conditions of supervision, agrees to report on the person's progress on a regular basis, and agrees to report any violations of supervised release immediately.
- The person has housing arrangements that are sufficiently secure to protect the community, and the person or agency that is providing the housing agrees in writing to accept the person, provide or allow for the level of safety the court requires, and, if the person or agency providing the housing is a state or local government agency or is licensed by DHFS, immediately report any unauthorized absence of the person from the housing arrangement.
- The person will comply with the provider's treatment requirements and all of the requirements that are imposed by DHFS and the court.
- DHFS has made provisions for the necessary services, including sex offender treatment, other counseling, medication, community support services, residential services, vocational services, and alcohol and other drug abuse treatment.

Supervision of Persons on Supervised Release

Under *current law*, an order for supervised release places the person in the custody and control of DHFS. DHFS must arrange for control, care, and treatment of the person in the least restrictive manner consistent with the requirements of the person and in accordance with the plan for supervised release. A person on supervised release is subject to the conditions set by the court and to DHFS rules.

The state has the burden of proving by clear and convincing evidence that any rule or condition of release has been violated or that the safety of others requires that supervised release be revoked. If

the court determines that any rule or condition of release has been violated or that the safety of others requires that supervised release be revoked, it may revoke the order for supervised release and order that the person be placed in an appropriate institution.

Under the *substitute amendment*, if the court finds that any rule has been violated and that the violation merits the revocation of the order granting supervised release, the court may revoke the order and order that the person be placed in institutional care. If the court finds that the safety of others requires that supervised release be revoked, the court must revoke the order granting supervised release and order that the person be placed in institutional care.

Discharge From Commitment

Under *current law*, if the Secretary of DHFS determines at any time that a person is no longer a sexually violent person, the Secretary must authorize the person to petition the committing court for discharge. The state has the burden of proving by clear and convincing evidence that the person is still a sexually violent person.

A person may also petition the court for discharge from custody or supervision without the approval of the Secretary of DHFS.

The state has the burden of proving by clear and convincing evidence that the committed person is still a sexually violent person. If the court is satisfied that the state has not met its burden of proof, the petitioner must be discharged from the custody and supervision of DHFS. If the court is satisfied that the state has met its burden, the court may proceed to determine whether to modify the person's existing commitment order by authorizing supervised release.

The *substitute amendment* modifies the provisions relating to petitions for discharge that do not have DHFS's approval. In that circumstance, the court must deny the petition without a hearing unless the petition alleges facts from which the court may conclude that the person's condition has changed so that the person does not meet the criteria for commitment as a sexually violent person.

If the court is satisfied that the state has not met its burden of proof, the petitioner must be discharged from the custody and supervision of DHFS. If the court is satisfied that the state has met its burden, the court may proceed to determine whether to modify the person's existing commitment order by authorizing supervised release.

Escape

Under the *substitute amendment*, a person who intentionally escapes from custody under the following circumstances is guilty of a Class F felony, punishable by a fine not to exceed \$25,000 and a term of imprisonment and extended supervision not to exceed 12 years and six months:

- While subject to a detention or custody order pending a petition to commit the person as a sexually violent person.
- While subject to an order committing the person to custody of DHFS, regardless of whether the person is placed in institutional care or on supervised release.

Procedure

The substitute amendment contains the following procedural provisions:

- The DA of the county in which the person is in custody is permitted to file a commitment petition, in addition to the DA for the county in which the person was convicted, or the county in which the person will reside, as provided under current law. The petition must be filed before the person is released or discharged.
- Generally, the court must hold the probable cause hearing within 30 days. There is no time limit under current law. If the person named in the petition is in custody and the probable cause hearing will be held after the date on which the person is scheduled to be released, the hearing must generally be held no later than 10 days after the person's scheduled release or discharge date. Under current law, if the person is in custody, the hearing must be held within 72 hours.
- A trial to determine whether the person who is the subject of a commitment petition is a sexually violent person must commence no later than 90 days after the date of the probable cause hearing instead of within 45 days, as provided under current law.
- The substitute amendment sets forth provisions specific to ch. 980, Stats., for change of venue and discovery.
- The right to remain silent is unaffected. However, the state may present comment on evidence that a person who is the subject of a commitment petition or a person who has been committed refused to participate in an examination of his or her mental condition.
- Confidential juvenile court records, law enforcement records relating to juveniles, pupil records, reports of child abuse and neglect, mental health court records, and patient health care records are open for inspection by and production to authorized representatives of the Department of Corrections (DOC), DHFS, DOJ, or a DA for use in the evaluation or prosecution of any sexually violent person proceeding, if the records involve or relate to an individual who is the subject of a sexually violent person proceeding. The court in which the proceeding is pending may issue protective orders concerning information that is made available or disclosed under this provision. Any representative of DOC, DHFS, DOJ, or a DA may disclose information obtained under this provision for any purpose consistent with any sexually violent person proceeding.
- The disposition of a juvenile, and any record of evidence given in a hearing in juvenile court, are admissible as evidence against the juvenile in a hearing, trial, or other sexually violent person proceeding relating to a juvenile.
- There is no privilege as to communications between a person subject to sexually violent person proceedings and a health care provider relevant to an issue in proceedings for control, care, and treatment of a sexually violent person if the health care provider has determined in the course of treatment that the person is in need of such control, care, and treatment.

- Failure to comply with any time limit specified in ch. 980, Stats., does not deprive the court of jurisdiction or of competency to exercise that jurisdiction. Failure to comply with any time limit is not grounds for an appeal or grounds to vacate any order, judgment, or commitment issued or entered.
- Any agency or officer, employee or agent of an agency is immune from criminal or civil liability for any acts or omissions as the result of a good faith effort to comply with any provision of ch. 980, Stats.

Committee to Recommend Location of Transitional Facility for Sexually Violent Persons

The substitute amendment creates a committee to assist the state in determining the location for a transitional facility for the housing of sexually violent persons.

LEGISLATIVE HISTORY

Assembly Substitute Amendment 2 was offered by Representatives Stone, Krug, and Staskunas. The Assembly adopted the substitute amendment and passed the bill, as amended, on voice votes on March 10, 2004.

AS:jal